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not lawfully convey an estate in excess of his own, yet he could so convey tortiously, and should not by exercising his power subsequently be allowed to derogate from his own grant.[6] But at the present day, when all conveyances are innocent, such reasoning has no place, since the exercise of a power in which the grantor has no interest cannot derogate from a conveyance which carries his interest.[7] Neither have the English cases differentiated between powers to appoint by deed and powers to appoint by will: they have allowed both alike to be extinguished. The intention of the donor of the power is a cardinal consideration in the whole law of powers and is always to be carefully weighed.[8] In all powers to appoint by will the donor has *ipso facto* expressed an intention that the donee should be free to exercise the power up to the day of his death. Equity recognizes that intention and refuses to aid the execution by deed of a power to appoint by will.[9] Furthermore a donee of a power to appoint by will has no interest in the exercise of the power, for he cannot appoint to himself. Therefore, in spite of the dissenting opinion[10] in a recent case, the incipient tendency[11] of American courts towards the view that such a power is inextinguishable appears to reach a result which is logically sound and which also effectuates the donor's intention. *McFall* v. *Kirkpatrick*, 86 N. E. 139 (Ill.)

LIBEL OF A CANDIDATE FOR ELECTION TO A PUBLIC OFFICE. — A communication made *bona fide* upon a subject matter, in reference to which the party communicating has a duty, is privileged, if made to a person having a corresponding duty, even though it be only a moral duty of imperfect obligation.[1] Although this proposition of Lord Campbell's has been generally accepted, the courts have reached different results in its application; and the diversity of opinion has been especially great on the question whether the rule should be applied to communications made to the public regarding

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[6] West *v.* Berney, 1 Russ. & M. 431; Smith *v.* Death, 5 Madd. 371; Horner *v.* Swann, Turn. & R. 430; Bickley *v.* Guest, 1 Russ. & M. 440; Smith *v.* Plummer, 17 L. J. Ch. 145.

[7] Learned *v.* Tallmadge, 26 Barb. (N. Y.) 443. The validity of an appointment which is not in derogation of a grant, *e. g.*, an appointment after bankruptcy of the donee, is unquestioned. Doe *v.* Jones, 10 B. & C. 459; Legett *v.* Doremus, 25 N. J. Eq. 122.

[8] *Cf. inter al.* Sugden, Powers, 58, 60.

[9] Story, Eq. Jurispr., 11 ed., § 97; Reid *v.* Shergold, 10 Ves. Jr. 370, 379.

[10] The majority went off on a very dubious application of the Rule in Shelley's Case which made the power a power appendant, and hence extinguishable. But a dissenting judge considered that the donee had only a life estate; consequently that the power to appoint in fee by will was a power in gross, which was not extinguished by the conveyance in fee, as such conveyance only operated on her life interest and could not be an appointment, which could only be made by will. For a full statement of the facts of this case, see RECENT CASES, p. 456.

[11] Learned *v.* Tallmadge, *supra;* Gaskins *v.* Finks, 90 Va. 384; Bentham *v.* Smith Cheves (S. C.) Eq. 33; Ruggles *v.* Tyson, 104 Wis. 500; *In re* Collard & Duckworth, 16 Ont. 735. See also Dorizac *v.* Public Trustee, 13 New Zealand 538; Williams, Real Property, 18 ed., p. 371. *Contra*, Thorington *v.* Thorington, 82 Ala. 489; Atkinson *v.* Dowling, 33 S. C. 414; Grosvenor *v.* Bowen, 15 R. I. 549. The first two cases follow the English authorities without reasoning. See also Norris *v.* Thomson's Excrs., 19 N. J. Eq. 307, where the class to whom the appointment was to be made joined with the donee in extinguishing.

[1] Harrison *v.* Bush, 5 E. & B. 344.

a candidate for election. In perhaps the majority of jurisdictions, although a candidate may be the object of fair comment and criticism based upon his known acts, the occasion is not privileged.[2] If the facts upon which the comment is based do not exist, the communicant is liable irrespective of his motives or belief.[3] On the other hand, a minority hold with a recent Kansas decision that the occasion is privileged when the communication is made in good faith and with probable cause for belief.[4] *Coleman* v. *MacLennan*, 98 Pac. 281. The matter alleged must relate to the fitness of the candidate for office,[5] and facts as well as comment are covered by the privilege. In this feature lies the difference between the two views.

The case seems to come well within the letter of Lord Campbell's rule. One believing facts which, if true, show the candidate to be incapable or unfit for office is certainly under a moral duty to disclose those facts to the voters. Nor does the fact that the information is volunteered affect the question of privilege.[6] When a communication concerning a candidate for appointment to an office is made to the person or body having the power of appointment, the occasion is very generally held to be privileged,[7] and this in jurisdictions denying the privilege in the other case. The analogy is very close, the only difference being in the size of the class to which the communication is made. But it is argued that where the communication is made to the public at large, the voters, the damage done to the reputation of the individual would more than overbalance the benefit accruing to the public, and that a wider privilege would cause many to refrain from running for public office.[8] But in a country like our own, where public offices are so generally elective, it would seem to be of the utmost importance that the electors should have every opportunity of hearing facts about the candidates, and that one who has information which he *bona fide* believes to be true should not be deterred from communicating it by a fear of incurring legal liability therefor. The danger from unwarranted attacks is done away with by requiring reasonable grounds for belief in the information conveyed.

Although it is frequently said that English courts are opposed to the more liberal rule, the question there may still be regarded as an open one. One early case seems to admit the privilege, although the decision went off on the ground of an excess in the manner of publication.[9] All the later cases concern, not a candidate for election, but one who is already in office. In such a case those to whom the communication is made do not have the duty to vote ; so that the application of Lord Campbell's rule is not so clear. Some cases in this country, however, do not make this distinction, arguing that even though it be the case of a man already in office, his continuance there is in the control of the people and that therefore they have a right to the information.[10]

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2 Post Publishing Co. *v.* Hallam, 59 Fed. 530.
3 Eikhoff *v.* Gilbert, 124 Mich. 353.
4 Briggs *v.* Garrett, 111 Pa. St. 404.
5 Express Printing Co. *v.* Copeland, 64 Tex. 354.
6 See Erber *v* Dun, 12 Fed. 526.
7 Thorn *v.* Blanchard, 5 Johns. (N. Y.) 508 ; Weiman *v.* Mabee, 45 Mich. 484.
8 Post Publishing Co. *v.* Hallam, *supra.*
9 Duncombe *v.* Daniell, 8 C. & P. 222.
10 Palmer *v.* City of Concord, 48 N. H. 211.